

No. 11771

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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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WILLIAM P. STUART, United States Collector of  
Internal Revenue in and for the State of Arizona,  
Appellant,  
vs.

HENRY ONG, President of Sun Kwung Tong Com-  
pany, an association, CHINESE CHAMBER OF  
COMMERCE OF PHOENIX, a corporation;  
FRANK ONG, as Chairman of the Wing Mae School  
in China, an association; YUEN LUNG, Chairman  
of the Chinese School of Phoenix, Arizona, an as-  
sociation; and FRED WONG, Chairman of the  
Chinese War Relief Association, an association,  
Appellees.

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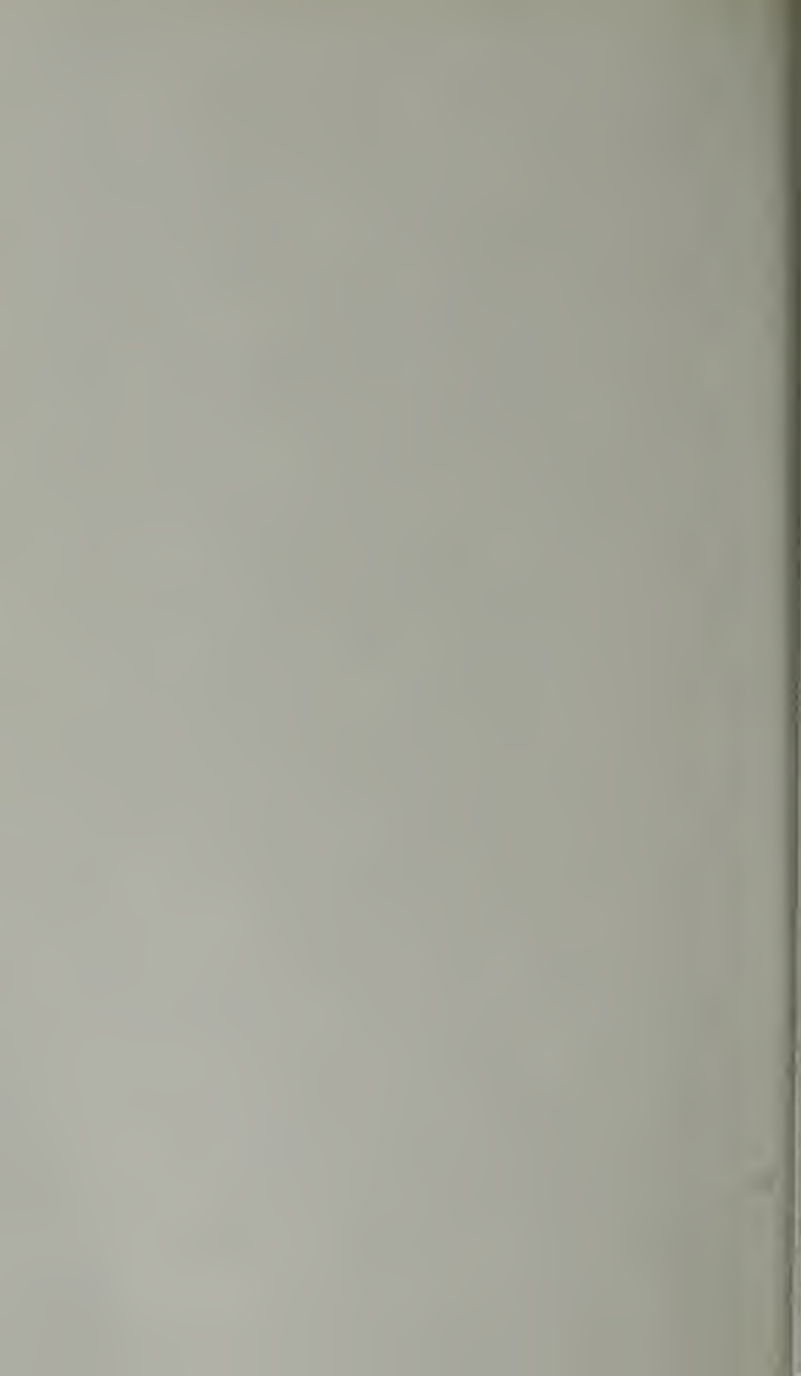
ON APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES FOR THE DISTRICT,  
OF ARIZONA

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BRIEF OF THE APPELLEES

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JERMAN & FLYNN  
*Attorney for Appellees*



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ON APPEAL FROM THE DISTRICT COURT OF  
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JERMAN & FLYNN  
*Attorney for Appellees*

OPINION BELOW  
No written opinion filed.

**JURISDICTION**

Jurisdictional facts are set forth in the appellant's  
opening brief.

**QUESTIONS PRESENTED**

1. Whether Section 3772 of the Internal Revenue  
Code applies to the appellees herein, and whether or

not the appellees must comply with the terms thereof prior to the institution of an action against an agent of the United States Government for the return of moneys wrongfully seized and withheld.

2. Whether the District Court had jurisdiction to enter a money judgment against the collector where there was no showing during the trial of the case that the moneys involved were not in the collector's possession.

### STATEMENT

The statement contained in the appellant's opening brief in general sets forth the facts in a clear and concise manner. There are, however, certain features omitted in the appellant's statement which we desire to point out.

As stated by the appellant in the opening brief, the funds in question were seized on or about October 11, 1945, from Ung Too Thet, alias Ung Kok Si. Thereafter during the month of November, 1945, the appellees, and each of them, filed a demand for refund with William P. Stuart, Collector of Internal Revenue for the State of Arizona. The demands were filed when it was determined by counsel for the appellees that the funds in question had been turned over to the Collector of Internal Revenue, the appellant herein, by the arresting narcotic agents. (See Appendix 1)

The appellant did not acknowledge receipt of the demands for refund and no information was available with reference to the disposition thereof, save and except oral information to the effect that the claims had been forwarded to the Commissioner of Internal Revenue in Washington, D. C.

What disposition was made of the funds in question

after they were received by the Collector of Internal Revenue from the narcotic agents does not appear in the record until the appellant's motion to dismiss was filed on May 26, 1947. (R. 51.) The motion to dismiss was filed three days after the motion for a new trial had been denied. (R. 48) The motion to dismiss is supported by an affidavit of the appellant wherein it states, among other things, that the funds had been covered to a Treasury account on the 30th day of October, 1945. (R. 51)

It is noted that the appellant makes this affidavit. However, in the trial of the issues embraced by the complaint and the answer thereto, no mention was made of the fact that the funds were not in the possession of the appellant during the course of the trial, or that the same had been covered into the Treasury. (R. 51)

The motion to dismiss for lack of jurisdiction filed by the appellant on May 26, 1947, was denied by the court on the same day it was filed, and was denied before the appellees had an opportunity to file any controverting affidavits. (R. 52)

The affidavit in support of the motion to dismiss and the answer filed to the plaintiff's complaint both admit that the demands for refund had been filed by the appellees with the appellant. (R. 21; 49; 51)

On the 31st day of January, 1946, a request was made by the appellees, and each of them, through channels to the Attorney General of the United States of America for permission to sue the United States Government for a return of the funds in question illegally seized and held. (See Appendix 12)

On the 20th day of February, 1946, the appellees

were advised by the office of the United States Attorney General in and for the District of Arizona that permission to sue the United States Government had been denied by the Attorney General of the United State of Arizona. (See Appendix 14) Thereafter on March 1, 1946, the present action was instituted. (R. 20)

### SUMMARY OF THE ARGUMENT

The appellees contend that they are not strictly taxpayers within the meaning of the provisions of Section 3772 of the Internal Revenue Code and were not required to comply strictly with the terms thereof prior to the institution of the action. The appellees further contend that there was sufficient compliance upon their part with the provisions of Section 3772 of the Internal Revenue Code to give the District Court jurisdiction in the action.

The mere fact that the collector, who had wrongfully seized and withheld funds belonging to innocent third parties, covered the funds into the Treasury department did not prevent a judgment from being rendered against him, and where there was no showing made during the trial of the case by the Collector that the moneys were not in his possession at the time of the trial, the defense of having covered the said moneys into the Treasury is waived, and cannot be interposed for the first time upon appeal.

The issuance of a certificate of probable cause converts a suit against the collector in effect to one against the United States Government.

## ARGUMENT

## I.

STRICT COMPLIANCE WITH SECTION 3772 OF THE INTERNAL REVENUE CODE WAS NOT REQUIRED OF THE APPELLEES IN THIS CASE AND THE APPELLEES HAVE ADEQUATELY COMPLIED WITH THE PROVISIONS THEREOF.

The appellees desire to preface this argument with a brief statement of the action taken prior to the institution of the suit.

Shortly after the moneys were seized from the appellees, they, and each of them, filed a demand with the Collector of Internal Revenue in and for the District of Arizona. The demands were clear and concise, and clearly showed the position and claim of each of the appellees. (See Appendix 1)

The demands were filed with the collector and forwarded to the Commissioner of Internal Revenue, Washington, D. C. It is true that these demands were not filled out on any form furnished by the United States Government. They were simply demands stating the appellees' position and claim with reference to the moneys seized and wrongfully withheld by the Collector of Internal Revenue. When the demands were filed with the Collector, he was put on notice that the moneys in his possession did not belong to Ung Too Thet, alias Ong Kok Si, the taxpayer against whom a tax assessment was being levied. Certainly it cannot be argued that the appellees were taxpayers within the meaning of Section 3772 with reference to their moneys wrongfully seized. It can not be argued that they must fill out any form furnished by the United States Government for a tax refund. Strictly speaking, they

were not asking for a tax refund, but were merely asking for the refund of moneys wrongfully seized and withheld.

Therefore, by filing the demands with the Collector of Internal Revenue, he was put on notice and was fully apprized of the claims of the appellees, and each of them, that is as to the amounts and the reason for their respective claims. The demands made upon the Collector, it is urged, were sufficient compliance with Section 3772 of the Internal Revenue Code, and furnished the Collector with all of the necessary information.

When the funds in question were seized by the Collector of Internal Revenue, he acted as an agent for the Commissioner of Internal Revenue, and when the funds were turned in by the Collector to the Commissioner, he again acted as his agent. Therefore, if he was an agent for the Commissioner in the delivery of the funds to the Commissioners, he likewise is agent for the transmission of the demands, and we respectfully urge that the demands made upon the Collector of Internal Revenue were in truth and in fact demands made upon the Commissioner of Internal Revenue, since a demand made upon an agent in a case of this nature is a demand upon the principal.

The demands for the refund submitted by the appellees in this case were identical with those submitted in the companion case, *Gee Soot Hong v. William P. Stuart, Collector*, (R. 27) and in the *Hong* case the Collector considered the demands adequate and in sufficient compliance with Section 3772, and satisfied the judgment of the District Court returning to the plaintiffs in that case two uncashed cashier's checks, which

were in the possession of the Collector. See footnote, page 16, Appellant's Opening Brief.

It is ridiculous to argue that the appellees, innocent third parties, should be forced to litigate the tax claims of Ung Too Thet, alias Ong Kok Si, and the United States Government. They had no information as to his taxes, or any knowledge thereof, or any information as to the claims of the United States Government against the said taxpayer, if any.

When the moneys in question were seized by the Collector of Internal Revenue from the narcotic agents, what property rights, if any, did the collector have in and to said funds? The only property rights the Collector could assert against the funds would be the rights of Ung Too Thet, alias Ong Kok Si, the taxpayer. Internal Revenue Agents secure no greater right against property in the hands of a third person than the rights of the third person in and to the said property.

In *Karno-Smith Co. v. Maloney, Collector, Internal Revenue, 112 F. (2) 690 (CCA3)*, the Circuit Court of Appeals for the Third Circuit, at page 692, stated the rule as follows:

“We think it clear that in a case of this kind the rights of the Collector rise no higher than those of the taxpayer whose right to property is sought to be levied on. *U.S. v. Western Union Telegraph Co.*, 2 Cr., 50 F. (2d) 102.”

Under the rule cited, the collector in the instant case had no greater property right in and to the funds in question than the taxpayer, Ung Too Thet, alias Ong Kok Si. The evidence in the record now stands undisputed that the funds belonging to the appellees were trust funds held by the taxpayers, Ung Too Thet, alias

Ong Kok Si, and funds in which he had no interest of any kind, but was merely holding the same as trustee. Consequently, what, if any, property right could the Collector have in and to the said funds after seizing them from the taxpayer? We respectfully urge that the Collector could have no property right of any kind therein or any right of possession thereto, and that the said funds now in the Treasury constitute an unjust enrichment at the expense of the appellees, innocent third parties.

Section 3772 of the Internal Revenue Code has been universally construed as applying to taxpayers. In the instant case, the moneys were seized and held by the Collector and applied upon a tax allegedly due and owing the government from Ung Too Thet, alias Ong Kok Si. What is a taxpayer in the light of Section 3772 providing for refunds? Certainly the tax in question applied to Ung Too Thet, alias Ong Kok Si, in this case was not a tax that could be collected from the appellees, or either of them. There were no taxes assessed against them, or either of them, or collected from them, or either of them.

Therefore, this suit may not be referred to as a claim for the refund of taxes. It is actually a suit to recover moneys wrongfully exacted by the Collector under the color of his office from persons against whom no tax was assessed. A taxpayer is defined in *White v. Hopkins*, 50 F. (2d) 151 (CCA5), as follows: "One who pays a tax."

As to the sufficiency of the demands made by the appellees herein for a return of their funds, it seems clear to us that the demands, and each of them, clearly set forth all the necessary information for the Collector of Internal Revenue, and were adequate.



*Bladine, Collector, Internal Revenue v. Chicago Joint Stock Land Bank, 63 F. (2d) 317.*

As a matter of fact, the appellant in his opening brief, on page 14 thereof, makes the following statement with reference to the sufficiency of the claim:

“We have, however, no doubt, that the claim for refund with which we are concerned complied with the law, and gave to the Commissioner all of the information to which he was entitled, and all that it was necessary for him to have in order to satisfy himself that the appellees were making claim for the recovery of sums wrongfully exacted by the Collector of Internal Revenue, and the precise grounds thereof.”

In view of the fact that the appellees' request to sue the United States Government was not granted, they were left with no alternative save and except to file an action against the Collector for the return of their funds, or in lieu thereof a judgment for the respective amounts. To deprive the appellees from recovering the moneys wrongfully exacted from them by the Collector and denying them any remedy either against the United States or the Collector would amount to the confiscation of property without due process of law and in violation of the *Fourteenth Amendment to the Constitution of the United States*.

*Bladine, etc. v. Chicago Joint Stock Land Bank, supra.*

Where public officials become tort feasers by exceeding the limits of their authority and where they unlawfully seize and hold a citizen's chattels or realty, recoverable by appropriate action at law or in equity, such a person is not relegated to the court of claims to recover a money judgment. The dominant interest of the sovereign is on the side of the victim. He may

bring a possessory action to regain that which is wrongfully withheld.

*Land v. Dollar*, 67 S.Ct. 1009 (Decided April 7, 1947)

It must be remembered that this is not a case where the judgments will expend themselves upon the United States Treasury. The funds in question never became the property of the United States but are to this day the property of the appellees. It is a case similar in all respect to *Land v. Dollar* cited supra. To then allow the Treasury to retain the funds in question would constitute as above stated an unjust enrichment at the expense of the appellees. Certainly the United States Government has not reached a point that it will treat its citizens in such a manner. There are no statutes authorizing confiscation of property without due process of law merely because the property happens to be in the hands of a third party. It is unconcionable to believe that a government agent may seize property from a party, and even though it is conclusively proved that the property did not belong to him, apply the same to a debt of the person from whom the property was taken.

## II.

THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE CONVERTS A SUIT AGAINST THE COLLECTOR IN EFFECT TO ONE AGAINST THE UNITED STATES GOVERNMENT.

*Section 842, Title 28, U.S.C.A.*, provides as follows:

“When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him

paid into the the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.”

The issuance of a certificate of probable cause converts a judgment against a collector in effect to one against the United States Government.

*United States v. Sherman*, 98 U.S. 565, 567, 25 L.Ed. 235;

*Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378, 53 S.Ct. 620, 77 L.Ed. 1265;

*Crocker v. Malley*, 249 U.S. 223, 235, 39 S.Ct. 270, 63 L.Ed. 573, 2 A.L.R. 1601;

*Lowe Bros. Co. v. United States*, 304 U.S. 302, 306, 58 S.Ct. 896, 82 L.Ed. 1362;

*Huntley v. Southern Oregon Sales*, 104 F(2) 153 (CCA9);

*Sheehan, et al. v. Hunter*, 133 F. (2d) 303, 304 (CCA5).

The appellant argues in his brief that the District Court erred in entering judgment against the Collector because it was impossible for the collector to comply with the terms thereof. The basis for his argument is that by reason of the fact that the moneys in question had been deposited in the United States Treasury, the Collector had no further jurisdiction thereof and could not return the same to the appellees.

The deposit by the Collector of Customs of fines into the United States Treasury is no bar to a judgment

against him, and a right of action for moneys had and received lies against a collector to recover moneys illegally collected with notice that they were paid under protest.

*DeLima v. Bidwell*, 21 S.Ct. 743, 746, 182 U.S. 1, 45 L.Ed. 1041;

*Cosulich Line of Trieste v. Eltin*, 40 Fed. (2d) 220, (CCANY 1930)

Congress, by continuing against an Internal Revenue Collector the right of action for taxes illegally exacted, has for the most practical purposes reduced the collector's personal liability to a fiction, but it was intended that the right to maintain the action and its incidents, including the right to a jury trial, should be left undisturbed until judgment is rendered.

*United States v. Kales*, 62 S.Ct. 214, 314 U.S. 186, 86 L.Ed. 132.

In the instant case, subsequent to the entry of judgment, the appellant, acting through his attorneys, secured a certificate of probable cause from the United States District Court on the 8th day of May, 1947. (R. 47).

An examination of the certificate reflects that the court made a finding to the effect that the Collector was acting under the direction of the Commissioner of Internal Revenue, and on probable cause. Therefore, as of the 8th day of May, 1947, the date upon which the certificate of probable cause issued (R. 48), the judgments of the appellees herein became in effect judgments against the United States Government, and the argument of the appellant to the effect that the Collector cannot comply with the terms of the judgments is now a moot question.

It is deemed advisable, however, to point out here that during the course of the trial, the Collector made no mention of the fact that the moneys involved were not in his possession during the trial. Such a defense was not raised nor passed upon by the trial court, and was waived. *Federal Rules of Civil Procedure, Rule 12, Subsection (h), Title 28, U.S.C.A.*

It appears from the appellant's opening brief in the footnote on page 7 thereof that the attorneys for the Collector had no information that the funds in question had been turned into the United States Treasury as of October 30, 1945. If on the other hand the Collector and his attorneys were aware of the fact that the funds had been turned into the Treasury on October 30, 1945, and they did not present this defense to the District Court, the same constitutes an intentional misleading of the court.

Certainly, it would be impossible for the appellees or their attorneys to have any information as to what disposition was made of the funds after they were seized by the Collector.

The transfer of funds from one department of the Government to another, without the knowledge of the appellees, should not be allowed to defeat a just claim in a court of justice.

### CONCLUSION

The issues raised on this appeal were matters brought to the attention of the trial court on a motion to dismiss after the motion for a new trial had been denied. The motion to dismiss was denied before the attorneys for the appellees had an opportunity to file controverting affidavits or make any record thereon. Consequently, the appellees have been forced to rely

on matters de hors the record in the presentation of their brief. This we regret. On the other hand if the defense had been raised properly during the course of the trial, a complete record could have been made thereon.

The actions of the agents of the Government in the handling of this case reflect a disregard for the rights of the appellees herein, and by failing to raise the defenses presented on the motion to dismiss at the trial of the case, have placed the trial court and the appellees in a very peculiar position. Certainly such activity on the part of Government agents should not be tolerated in the United States Courts.

All of the points raised on this appeal could easily have been raised during the course of the trial, which would have given the trial court the opportunity to pass thereon, and would especially have given the appellees an opportunity to make a record. The failure to do so rests entirely with the Government agents in charge of the case, and as stated above, we are forced to rely on matters set forth in the Appendix in order to present the questions clearly to this court.

The equities in this case overwhelmingly preponderate in favor of the appellees. Hypertechnical defenses and niceties should not be allowed to defeat a just claim.

It is respectfully submitted that, on the state of the record, an affirmance of the judgments of the trial court is commanded.

Respectfully submitted  
JERMAN & FLYNN  
Attorneys for Appellees

February, 1948

## APPENDIX

DEMAND FOR FUNDS BELONGING  
TO SUN KWONG TONG COMPANY

TO THE HONORABLE:

T. A. Talent, District Supervisor  
Earl A. Smith, Deputy Supervisor  
District X, U. S. Treasury Department  
Phoenix, Arizona

W. P. Stuart  
U. S. Collector of Internal Revenue  
Phoenix, Arizona

Comes now Henry Ong as President of the Sun Kwung Tong Company, and respectively represents, requests and demands:

## I.

That he is the president of the Sun Kwung Tong Company.

## II.

That the Sun Kwung Tong Company delivered the sum of \$1,900.00, more or less, in cash for safekeeping to one Ung Too Thet, alias Ong Kok Si, to be held in trust for the said Sun Kwung Tong Company. The undersigned has been informed and believes and therefore alleges that said identical funds were placed in a safe at 113 East Madison St., Phoenix, Arizona and were there on October 11, 1945 when United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds.

That said funds were not loaned to the said Ung Too Thet, alias Ong Kok Si, but held strictly for the benefit of said Sun Kwung Tong Company.

WHEREFORE, the undersigned as President of the Sun Kwung Tong Company does hereby request and demand the return and delivery of the sum of \$1,900.00 in cash seized as aforesaid.

Dated this 29th day of November, 1945.

/s/ HENRY ONG

STATE OF ARIZONA }  
 COUNTY OF MARICOPA } ss.

HENRY ONG, being first duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief, and as to those he verily believes the same to be true.

/s/ HENRY ONG

Subscribed and sworn to before me this 29th day of November, 1945.

/s/ WALTER ONG  
 Notary Public

(NOTARIAL SEAL)

My commission expires Nov. 18, 1949.

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DEMANDS FOR FUNDS BELONGING TO  
 CHINESE CHAMBER OF COMMERCE OF  
 PHOENIX, ARIZONA

TO THE HONORABLE:

T. A. Talent, District Supervisor  
 Earl A. Smith, Deputy Supervisor  
 District X, U. S. Treasury Department  
 Bureau of Narcotics  
 Phoenix, Arizona



W. P. Stuart  
U. S. Collector of Internal Revenue  
Phoenix, Arizona

Comes now Henry Gong as President of the Chinese Chamber of Commerce of Phoenix, Arizona, and respectfully represents, requests and demands:

### I.

That he is the president of the Chinese Chamber of Commerce of Phoenix, Arizona.

### II.

That the Chinese Chamber of Commerce of Phoenix, Arizona delivered the sum of \$800.00, more or less, in cash for safekeeping to one Ung Too Thet, alias Ong Kok Si, to be held in trust for the said Chamber of Commerce. The undersigned has been informed and believes and therefore alleges that said identical funds were placed in a safe at 113 East Madison St., Phoenix, Arizona and were there on October 11, 1945 when United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds.

That said funds were not loaned to the said Ung Too Thet, alias Ong Kok Si, but held strictly for the benefit of said Chamber of Commerce.

WHEREFORE, the undersigned as President of the Chinese Chamber of Commerce of Phoenix, Arizona does hereby request and demand the return and delivery of the sum of \$800.00 in cash seized as afore-said.

Dated this 29th day of November, 1945.

/s/ HENRY GONG

STATE OF ARIZONA }  
 COUNTY OF MARICOPA } ss.

HENRY GONG, being duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief, and as to those he verily believes the same to be true.

/s/ HENRY GONG

Subscribed and sworn to before me this 29th day of November, 1945.

/s/ WALTER ONG  
 Notary Public

(NOTARIAL SEAL)

My commission expires Nov. 18, 1949.

---

DEMAND FOR FUNDS BELONGING TO  
 WING MAY SCHOOL IN CHINA

TO THE HONORABLE:

T. A. Talent, District Supervisor  
 Earl A. Smith, Deputy Supervisor  
 District X, U. S. Treasury Department  
 Bureau of Narcotics  
 Phoenix, Arizona

W. P. Stuart  
 U. S. Collector of Internal Revenue  
 Phoenix, Arizona

Comes now Frank Ong as chairman of the Wing May School in China and respectfully represents, requests and demands:

## 5

### I.

That he is the Chairman of the Wing May School in China; that a campaign was conducted for the purpose of soliciting funds from among the people in Arizona for the Wing May School in China, and some \$1,900.00, more or less, was raised by such activities.

### II.

That thereafter all of said funds in the amount of \$1,900.00, more or less, were delivered to one Ung Too Thet, alias Ong Kok Si, to be kept by him in trust for said school; that the undersigned has been informed and believes and therefore states that the said funds were placed in a safe owned and controlled by said Ung Too Thet, alias Ong Kok Si, as his usual place of business in Phoenix, Arizona, and were kept and held in trust for the said school; that said monies were not loaned to Ung Too Thet, alias Ong Kok Si, or were not to be used by him for his own benefit in any manner whatsoever, but only for safekeeping.

### III.

That on October 11, 1945 United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds located in a safe at 113 East Madison St., Phoenix, Arizona, upon the premises wherein Ung Too Thet, alias Ong Kok Si, operated his business; there the funds did not belong to Ung Too Thet, alias Ong Kok Si, but to said school, and the same were placed in said safe for safekeeping only.

### IV.

That for some time the Association was unable to transmit said funds to China on account of the war.

WHEREFORE, the undersigned as chairman of the

Wing May School in China does hereby request and demand the return and delivery to said school of the sum of \$1,900.00 in cash seized as aforesaid.

Dated this.....day of November, 1945.

-----  
 STATE OF ARIZONA }  
 COUNTY OF MARICOPA } ss.

FRANK ONG, being first duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief and as to those he verily believes the same to be true.

-----  
 Subscribed and sworn to before me this.....day of November, 1945.

-----  
 Notary Public

My commission expires:

-----  
 DEMAND FOR FUNDS BELONGING TO  
 CHINESE SCHOOL

TO THE HONORABLE:

T. A. Talent, District Supervisor  
 Earl E. Smith, Deputy Supervisor  
 District X, U. S. Treasury Department  
 Bureau of Narcotics  
 Phoenix, Arizona

W. P. Stuart  
 U. S. Collector of Internal Revenue  
 Phoenix, Arizona

Comes now Yeun Lung as Chairman of the Chinese School and respectfully represents, requests and demands:

### I.

That he is the Chairman of the Chinese School; that the following named Persons, Yee F. Sing, Henry Gong, Frank Ong, all of Phoenix, Arizona, conducted a campaign of soliciting funds among the people in Arizona for the Chinese School, and did raise some \$1,500.00, more or less, by such activities.

### II.

That thereafter all of said funds in the amount of \$1,500.00, more or less, were delivered to one Ung Too Thet, alias Ong Kok Si, to be kept informed and believes and therefore states that the said funds were placed in a safe owned and controlled by said Ung Too Thet, alias Ong Kok Si, at his usual place of business in Phoenix, Arizona, and were kept and held in trust for the said school; that said monies were not loaned to Ung Too Thet, alias Ong Kok Si, or were not to be used by him for his own benefit in any manner whatsoever, but only for safekeeping.

### III.

That on October 11, 1945, United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds located in a safe at 113 East Madison St., Phoenix, Arizona, upon the premises whereïn Ung Too Thet, alias Ong Kok Si, operated his business; that the funds did not belong to Ung Too Thet, alias Ong Kok Si, but to said school, and the same were placed in said safe for safe keeping only.

## IV.

That for some time the Association was unable to transmit said funds to China on account of the war.

WHEREFORE, the undersigned as chairman of the Chinese School does hereby request and demand the return and delivery to said school of the sum of \$1,500.000 in cash seized as aforesaid.

Dated this.....day of November, 1945.

-----  
 STATE OF ARIZONA }  
 COUNTY OF MARICOPA } ss.

YEUN LUNG, being first duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief, and as to those he verily believes the same to be true.

-----  
 Subscribed and sworn to before me this.....day of November, 1945.

-----  
 Notary Public

My commission expires:  
 \_\_\_\_\_

DEMAND FOR FUNDS BELONGING TO  
 CHINA WAR RELIEF ASSOCIATION

TO THE HONORABLE:

T. A. Talent, District Supervisor  
 Earl A. Smith, Deputy Supervisor

District X, U. S. Treasury Department  
Bureau of Narcotics  
Phoenix, Arizona

W. P. Stuart  
U. S. Collector of Internal Revenue  
Phoenix, Arizona

Comes now Fred Wong as Chairman of the China War Relief Association of Arizona and respectfully represents, requests and demands:

### I.

That he is the Chairman of the China War Relief Association of Arizona; that the following named persons, E. F. Sing, Henry Ong, Frank Ong, H. T. Tang, O. W. Yen, Walter Ong, all of Phoenix, Arizona, conducted a campaign of soliciting funds among the people in Arizona, and also staged various social affairs for the purpose of raising money for the China War Relief Association and did raise some \$14,000.00, more or less, by such activities.

### II.

That thereafter all of said funds in the amount of \$14,000.00, more or less, were delivered to one, Ung Too Thet, alias Ong Kok Si, to be kept by him in trust for said Association; that the undersigned has been informed and believes and therefore states that the said funds were placed in a safe owned and controlled by the said Ung Too Thet, alias Ong Kok Si, at his usual place of business in Phoenix, Arizona, and were kept and held in trust for the said Association; that said monies were not loaned to Ung Too Thet, alias Ong Kok Si, or were not to be used by him for his own benefit in any manner whatsoever, but only for safe-keeping.

## III.

That on October 11, 1945 United States Internal Revenue Agents from the Bureau of Narcotics seized the said funds located in a safe at 113 East Madison St., Phoenix, Arizona, upon the premises wherein Ung Too Thet, alias Ong Kok Si, operated his business; that the funds did not belong to Ung Too Thet, alias Ong Kok Si, but to said association, and the same were placed in said safe for safekeeping only.

## IV.

That for some time the Association was unable to transmit said funds to China on account of the war.

WHEREFORE, the undersigned as chairman of the China War Relief Association of Arizona does hereby request and demand the return and delivery to said association of the sum of \$14,000.00 in cash seized as aforesaid.

Dated this.....day of November, 1945.

-----  
 STATE OF ARIZONA                    }  
   } ss.  
 COUNTY OF MARICOPA            }

FRED WONG, being first duly sworn, upon his oath deposes and says: that he has read the foregoing instrument, and that the matters stated therein are true of his own knowledge in substance and fact, except as to matters stated upon information and belief, and as to those he verily believes the same to be true.

-----  
 Subscribed and sworn to before me this.....day of  
 November, 1945.



-----  
Notary Public

My commission expires:

BUREAU OF NARCOTICS  
El Paso, Texas  
December 7, 1945

SE-217  
Ariz-574

In re: Ung TOO THET alias  
ONG KOK SI

Mr. Wallace W. Clark,  
Attorney at Law,  
Title & Trust Building,  
Phoenix, Arizona.

Dear Sir:

This will acknowledge receipt of your letter dated December 1, 1945, transmitting claims for the return of \$17,400.00 seized from the above named person at the time of his arrest.

You are advised that this money was taken from the defendant by a Customs official for safe-keeping and was later seized by deputy collectors of the Collector of Internal Revenue at Phoenix, Arizona. It will be noted that representatives of this office were not concerned with the seizure of these funds; therefore, it is suggested that future correspondence relative thereto be addressed to the Collector of Internal Revenue, Phoenix, Arizona.

I might add, however, that \$3100.00, identified Government funds, was recovered from this defendant by narcotic and customs officers.

Yours very truly,

/s/ TERRY A. TALENT  
TERRY A. TALENT  
District Supervisor

JERMAN & FLYNN  
 Phoenix, Arizona  
 January 31, 1946

Mr. Frank E. Flynn  
 United States District Attorney  
 United States Court House  
 Phoenix, Arizona

Dear Mr. Flynn:

Mr. Henry Ong, acting for and on behalf of Sun Kwung Tong Company and as president thereof, Henry Gong, President of Chinese Chamber of Commerce of Phoenix, Arizona, Frank Ong, acting as chairman of Wing Mae School in China, Yeun Lung, chairman of the Chinese School of Phoenix, Arizona, Fred Wong, chairman of China War Relief Association, Gee Soot Hong, Yee Wo & Company, Tom Nom, and Fong W. Yuey, have retained us as their attorneys to represent them in an action wherein the United States Government is a necessary party defendant.

It appears from the facts available that on the 11th day of October, 1945, a Mr. Ung Too Thet, alias Ong Kok Si, was arrested by Narcotite Revenue Agents at his place of business located at 113 East Madison St., Phoenix, Arizona, for violation of the Harrison Narcotic Act and the Import and Export Drug Act. At the time of his arrest he was holding in trust for our clients approximately \$25,000.00, the respective amount for each client is listed as follows:

Sun Kwung Tong Company.....	\$ 1,900.00
Chinese Chamber of Commerce of Phoenix, Arizona .....	800.00
Gee Soot Hong.....	2,500.00
Yee Wo & Company, Tom Nom, Fong W. Yuey.....	2,500.00
Wing Mae School in China.....	1,900.00
Chinese School .....	1,500.00
Chinese War Relief Association of Arizona	14,000.00

On October 11, 1945, the arresting agents of the United States Government confiscated the above money and took possession thereof from the said Ung Too Thet, and we are informed and believe that the United States Government, acting through its agents, is applying the said funds on an income tax deficiency and liability of the said Ung Too Thet.

It is the contention of our clients that the amounts above referred to were held in trust, that the said Ung Too Thet had no interest therein and was not the owner thereof, and was merely a trustee.

It now appears as a matter of record in the United States District Court for the District of Arizona that the said Ung Too Thet has pleaded guilty to violation of the Harrison Narcotic Act and the Drug Import and Export Act. On January 28, 1946 Ung Too Thet was sentenced to five years imprisonment by the Honorable Dave W. Ling, United States District Judge for the District of Arizona; imposition of the said sentence was suspended on condition that the said Ung Too Thet depart the continental limits of the United States within thirty days from the date of the sentence.

In view of the fact that the above money referred to is being held by the United States Government, acting through its agents, it will be necessary for our clients to file an action in the United States District Court to secure recovery of the funds which they allege are theirs and which were in the possession of Ung Too Thet as above stated and confiscated by the agents of the United States Government.

We are, therefore, on behalf of our clients, requesting permission to file an action against the United States Government in the United States District Court for the District of Arizona to recover possession of the respective amounts for each of our clients as above set forth. We would appreciate it if you would take this matter up with the Attorney General of the United

States of America at your earliest convenience and favor us with his decision in the premises.

Very truly yours,

JERMAN & FLYNN

By /s/ JAMES E. FLYNN

James E. Flynn

JEF: bz

UNITED STATES ATTORNEY  
District of Arizona  
Phoenix

February 20, 1946

Jerman & Flynn  
Attorneys at Law,  
Security Building,  
Phoenix, Arizona

Attention: James E. Flynn

Re: In the Matter of Henry Ong, etc.

Gentlemen:

In your letter of January 31, 1946, addressed to this office, you asked in your concluding paragraphs for permission to file an action in the above entitled matter against the United States in the District Court for Arizona.

Copies of that letter were forwarded to the Attorney General and his reply received Monday. This will confirm the statement we gave you over the phone in which we quoted or summarized the following pertinent excerpts from the Attorney General's reply:

"It is noted that the petitioners contemplate filing an action in the United States District Court to secure recovery of the funds which they allege are theirs and which were in the possession of Ung Too Thet, alias Ong Kok Si, which moneys were confiscated by the agents of the United States Gov-

ernment presumably the Collector of Internal Revenue who applied said moneys to the credit of the outstanding income taxes assessed against Ung Too Thet. In view of this, Mr. Flynn has requested permission in behalf of his clients to file an action against the United States in the District Court for the District of Arizona to recover possession of the respective amounts which he designates belongs to each of the petitioners.

“The Attorney General cannot consent to the bringing of an action against the United States as requested. The proposed action will have to be brought in whatever manner and forum may be designated in the statute upon which reliance is placed. . . .”

Very truly yours,

F. E. Flynn,  
United States Attorney

/s/ CHARLES B. McALISTER  
Charles B. McAlister,  
Assistant U. S. Attorney

CBMcA;ah

